


A Privileged and Conventional Relationship: Legal Professional Privilege and the Law Officers' Convention

Rebecca Mitchell* and Michael Stockdale† 

Motions in the UK and Scottish Parliaments demanding the publication of legal advice to government from its Law Officers have tested the Law Officers' Convention that the existence and content of their advice is only disclosed exceptionally. They have demonstrated government relying on the Convention and legal professional privilege (LPP) to resist disclosure. This article provides the first coherent explanation of the relationship between LPP and the Convention. This is that government's right not to disclose Law Officers' advice is based on LPP with the Convention imposing a fetter on government's ability to waive privilege and/or to disclose whether Law Officers' have advised. The article provides new insights into the relationship between the UK, Scottish and Welsh Ministerial Codes and the Convention. The UK and Welsh Codes do not articulate the Convention's exception as applied in practice. The Scottish Code exhibits good practice that could be adopted elsewhere but also creates a variant Convention.

INTRODUCTION

Both legal professional privilege (LPP) and the Law Officers' Convention (the Convention) are used by the UK and Scottish Governments to justify refusal to disclose legal advice received from their Law Officers in the face of demands from parliament to do so. LPP maintains the confidentiality of lawyer/client communications. The effect of the Convention is that, subject to a limited exception (under which Law Officers' advice may exceptionally be disclosed), the existence and content of Law Officers' advice is not disclosed outside government. The Convention is articulated in a variety of sources including the Ministerial Code (ie the Ministerial Code of the UK Government), the Scottish and Welsh Ministerial Codes, the Cabinet Manual and *Erskine May*. These provide varying accounts of the nature of the Convention and its exception and of its relationship with LPP. The Convention is not referred to in the Northern Ireland Executive Ministerial Code (the Northern Irish Code), though it is applied in practice by the Attorney General for Northern Ireland.¹ This article provides the first coherent explanation of the relationship between the Convention and LPP. It demonstrates for the first time the divergence between the

*Associate Professor, Head of Research and Knowledge Exchange, Northumbria Law School, Northumbria University.

†Professor, Head of Law, Northumbria Law School, Northumbria University.

1 Attorney General for Northern Ireland, *Annual Report 2020/21* (Laid before the Northern Ireland Assembly on 3 February 2022) at [9].

Convention as applied in practice and its articulation in the various Ministerial Codes. It does so by analysis of the following issues. First, whether LPP and the Convention are separate entities or have a shared root. Secondly, the nature of the Convention's exception, under which Law Officers' advice can be disclosed. Third, to the extent to which LPP and the Convention differ, whether this can be explained by divergence of rationale. Fourth, the extent to which the Ministerial Codes and the Cabinet Manual reflect or modify the Convention as traditionally understood. Fifth, whether the Convention encompasses legal advice to government from legal advisers other than Law Officers. Finally, whether the approach that government will not normally disclose Law Officers' advice to parliament is justifiable and, if it is, whether and how parliament should be able to require the Law Officers to consider whether the Convention's exception is applicable.

Where divergence between articulation of the Convention in the Ministerial Codes or the Cabinet Manual and the Convention as applied in practice by government is identified, the article proposes solutions. These take the form of recommendations for significant modifications to the Ministerial Codes and the Cabinet Manual. In part these recommendations are based upon the transference of good practice identified in the Scottish Ministerial Code (the Scottish Code), though the version of the Convention in the Scottish Code is identified as a variant rather than as an articulation of the Convention as traditionally understood. The primary aim of these recommendations is to align articulations of the Convention in the Ministerial Codes and the Cabinet Manual with current practice of the relevant governments/in the relevant parliaments. Their significance is to enhance clarity for stakeholders, reducing confusion as to the nature of those circumstances in which disclosure is likely to be given and the process that should take place before a disclosure decision is made.

The article commences with a short section outlining the events that catalysed its writing. It is then divided into three main parts. The first part concerns the operation of LPP as between government and parliament. This includes consideration of the elements and consequences of and rationale for LPP and the assertion and waiver of privilege. It also reflects on the adjudication of privilege claims, comparing the position where LPP is asserted in court to that in which it is asserted in the parliamentary context. The second part concerns the nature of the Convention, including that of its exception, and provides the first coherent explanation of the relationship between the Convention and LPP. It compares and critiques the articulations of the Convention found in *Erskine May*, the UK, Scottish and Welsh Ministerial Codes and the Cabinet Manual, identifies their weaknesses and suggests improvements to the Ministerial Codes and the Cabinet Manual, including transferable good practice. It also identifies the Convention as articulated in the Scottish Code as a variant Convention and explains why this is so. The third part considers whether the existence of LPP and the Convention are justified when parliament seeks disclosure of Law Officers' advice. Upon the assumption that they are justified, it again suggests

good practice that could be incorporated into the Ministerial Codes and the Cabinet Manual.

Disclosure of Law Officers' advice: recent events

Whilst it is a relatively rare occurrence, the issue of disclosure of Law Officers' advice does arise.² The eventual publication in April 2005 of the Attorney General's (Goldsmith) advice to the Cabinet regarding the legality of the war in Iraq³ is one example, although this was not in response to a motion approved in parliament.⁴ The events which catalysed the writing of this article relate to two instances where, respectively, the UK and Scottish Governments did not wish to disclose Law Officers' advice and their Parliaments' attempt to force them to do so.

In early November 2018, the House of Commons applied pressure on the Government through a motion for return⁵ to try to compel publication in full of any legal advice, including that given by the Attorney General (Cox), relating to the proposed agreement between the UK and the EU for the UK's withdrawal from the European Union (the Withdrawal Agreement).⁶ In the ensuing debate, although the 'convention that Government legal advice should normally remain confidential, and that in ordinary circumstances it would not be appropriate to publish full advice, for good reason' was recognised,⁷ arguments were then made as to why, on this occasion, the Convention should not apply. One of the reasons given was the waiver of the Convention by successive governments in exceptional circumstances. The Withdrawal Agreement was, it was argued, an exceptional circumstance.⁸ The motion was put to the House and approved⁹ however the Government did not publish the requested legal advice. Instead, on 3 December 2018 the Attorney General made a statement to the House which purported to cover some of the legal issues relevant to the Withdrawal Agreement.¹⁰ The following day the House of Commons voted in favour of a motion finding the Government in contempt for failing to comply with the earlier motion for return and

2 In *Her Majesty's Treasury v Information Commissioner* [2010] QB 563 at [9], five occasions were identified (in a period of 40 years prior to 2008) where the fact that legal advice had been obtained was made public outside government. In four of these instances the content of that advice was also made public.

3 Published on 28 April 2005 on the Prime Minister's Office website, House of Lords Library Briefing, 6 December 2018, 2.

4 HC Deb vol 418 cols 1397, 1449-1460 9 March 2004.

5 The method by which the House (of Commons) exercises its power to call for papers, see House of Commons Procedure Committee, *The House's power to call for papers: procedure and practice* HC 1904 (2019).

6 HC Deb vol 649 col 190 13 November 2018.

7 HC Deb vol 649 col 191 13 November 2018.

8 *ibid*, cols 192, 195.

9 *ibid*, cols 235-236.

10 HC Deb vol 650 cols 546-550 3 December 2018.

publish the full legal advice.¹¹ Finally, on 5 December 2018, the legal advice was published.¹²

The most recent instance occurred in the Scottish legislature. In July 2020, the Scottish Government asserted LPP in declining to disclose documents to the Scottish Parliament's Committee on Scottish Government Handling of Harassment Complaints (the Harassment Committee).¹³ This Committee was set up on 5 February 2019 with a remit to 'consider and report on the actions of the First Minister, Scottish Government officials and special advisers in dealing with complaints about Alex Salmond, former First Minister'.¹⁴ The legal advice being requested by the Harassment Committee (given by both external counsel and the Lord Advocate) related to the Scottish Government's contest of a petition for judicial review (which was later conceded) brought by ex-First Minister Salmond relating to the manner in which complaints made against him were handled by government officials. The Government argued that it was bound by a convention that the legal advice received by it from the Crown Office is confidential. This argument continued to be made despite the Government being on the losing side of two motions in the Scottish Parliament requiring the release of this advice.¹⁵ As at Westminster, the 'long-standing convention that legal advice given to ministers is confidential, and that convention exists for good reasons'¹⁶ was recognised during debate on these motions at Holyrood. Arguments made in favour of releasing the advice focused on the public interest requirement in the Scottish Code and whether, in the circumstances, the balance was in favour of disclosure.¹⁷ Eventually, on 2 March 2021 the advice (albeit subject to some redactions) was made public, with additional documents being disclosed on 4, 5 and 15 March.¹⁸ Previously, on 1 March, a no confidence motion in the deputy First Minister, John Swinney, had been lodged in the Scottish Parliament.¹⁹

11 *ibid*, cols 728–731.

12 HCWS1142 (5 December 2018); HLWS1113 (5 December 2018).

13 Scottish Government, 'Response to Committee on the Scottish Government Handling of Harassment Complaints: Scottish Government participation in the judicial review' (20 July 2020) para 4 at https://webarchive.nrsotland.gov.uk/20210611030855/https://archive2021.parliament.scot/HarassmentComplaintsCommittee/SP_SGHHC2_Written_Statement_on_the_Judicial_Review_20_July_2020.pdf (last visited 17 March 2023).

14 Committee on the Scottish Government Handling of Harassment Complaints 1st report, 2021, Report of the Committee on the Scottish Government Handling of Harassment Complaints SP OR SGHCC 23 March 2021 at [12].

15 SP OR 4 November 2020, col 83 and SP OR 25 November 2020 col 97.

16 Murdo Fraser, SP OR 4 November 2020 col 23.

17 See for example Murdo Fraser and Andy Wightman, SP OR 4 November 2020 cols 23 and 30.

18 Scottish Government, 'Legal advice related to the Parliamentary Inquiry into the Scottish Government's Handling of Harassment Complaints (SGHHC)' at <https://www.gov.scot/publications/legal-advice-related-to-the-parliamentary-inquiry-into-the-scottish-governments-handling-of-harassment-complaints-sghhc/> [<https://perma.cc/8KAT-SNX7>].

19 S5M-24260.

THE OPERATION OF LEGAL PROFESSIONAL PRIVILEGE BETWEEN GOVERNMENT AND PARLIAMENT

Legal professional privilege: elements, consequences and rationale

In the law of England and Wales, in Northern Ireland and under Scots law²⁰ LPP has two limbs, litigation privilege (LP) and legal advice privilege (LAP).²¹ LAP attaches to confidential communications between lawyer and client for the dominant purpose of giving or obtaining legal advice.²² LP attaches to confidential communications between lawyer and client or a third party for the dominant purpose of adversarial litigation which is in reasonable contemplation.²³ The effect of successfully asserting privilege is that the client is entitled to withhold production of privileged communications and to require the legal adviser (and in the case of LP any third parties) to do the same.²⁴ LPP may also be relied on by government as a justification for declining to disclose legal advice it has received to parliament.

A claim of LPP will be established if either limb is in play, though it is possible that both limbs may apply to the same communication.²⁵ In July 2020 the Scottish Government asserted LAP and LP in declining to disclose documents to the Harassment Committee.²⁶ In contrast, the Scottish Code merely refers to '[t]he right to confidentiality of communications between legal advisers and their clients (sometimes referred to as legal professional privilege)', defining LPP in terms that do not appear to incorporate its LP limb (because third parties are not referred to).²⁷ In practice, there is no advantage in establishing both limbs of LPP rather than a single limb in relation to a communication, because establishing either limb means that LPP (which is a 'single integral privilege' with two 'sub-heads')²⁸ has been established, with the consequent right to object to disclosure. This means that where government asserts LPP to justify non-disclosure to parliament of legal advice it has received, an assertion of LPP grounded solely in LAP would normally suffice without the need to assert LP.

The rationale underlying LPP is, essentially, that it is in the public interest that clients act in accordance with the law. Obtaining accurate legal advice is contingent upon the client disclosing the relevant facts to the lawyer and clients may not be prepared to do this unless they are sure that such information will not be disclosed by the lawyer.²⁹ This will be referred to as the 'rule of law

20 Whilst there are some technical differences between LPP as it operates in England and Scotland, the position in general is similar in both jurisdictions (see *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1 at [103] per Lord Reed). The discussion of LPP in this article relates to the English authorities.

21 *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 (*Three Rivers (No 6)*) at [105] per Lord Carswell.

22 *Civil Aviation Authority v Jet2.Com Limited* [2020] QB 1027 at [86], [94].

23 *In Re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16.

24 See for example *Three Rivers (No 6)* n 21 above at [26] per Lord Scott of Foscote.

25 *Civil Aviation Authority v Jet2.Com Limited* n 22 above at [71] per Hickinbottom LJ.

26 Scottish Government, n 13 above, para 4.

27 Constitution and Cabinet Directorate, *Scottish Ministerial Code* (February 2018) at [2.39].

28 *Three Rivers (No 6)* n 21 above at [105] per Lord Carswell.

29 See for example *ibid* at [34] per Lord Scott of Foscote.

rationale'.³⁰ Where LP is relied upon in circumstances in which LAP would not arise, its rationale is founded upon the adversarial nature of litigation, it giving parties to the 'contest' freedom to prepare their cases without having access to each other's preparatory material.³¹

So far as Law Officers' legal advice to government is concerned, it is the rule of law rationale that is relevant, it being equally relevant in the context of communications between government and its Law Officers as it is between private or corporate clients and their lawyers. For example, when the Scottish Government asserted LPP against the Harassment Committee, it accepted that LPP and the Convention (the rationale for which is considered in the next part below) both 'support good government' by promoting 'the ability of Ministers and officials' decisions to be informed by appropriate analysis of the legal considerations'.³² The rule of law rationale and the relationship between the privilege and the maintenance of good government were re-emphasised by the Deputy First Minister in the Scottish Parliament, who also (with reference to answers given at committee by the Lord Advocate) emphasised the particular importance of the privilege in circumstances in which the the government's position may be tested in litigation.³³

Assertion and waiver of privilege and adjudication of privilege claims

LPP is a right which the client (for the purposes of this article, the government) can choose either to assert or to waive. The right to claim or waive privilege belongs to the client, not to the legal adviser,³⁴ though the legal adviser may possess express, implied or ostensible authority to waive privilege on the client's behalf.³⁵

Privilege may be lost where public references to a privileged document result in loss of confidentiality, the issue being whether the detail or extent of the references are such as to amount to a loss of confidentiality in the document as a whole.³⁶ Murphy described the Government's release of its position paper in the context of the Withdrawal Agreement as 'a partial disclosure of the legal advice' which 'destroyed its confidentiality' and 'effectively waived privilege in its totality'.³⁷ Technically, the issue may be better described as whether the release of the position paper resulted in a loss of confidentiality in the underlying legal advice, rather than amounting to a waiver of privilege though, as Thanki recognises,³⁸ the courts themselves do not always clearly distinguish one from

30 See *ibid* at [34] per Lord Scott of Foscote, adopting the terminology from Zuckerman.

31 See *ibid* at [52] per Lord Roger of Earlsferry.

32 Scottish Government, n 13 above para 4.

33 SP OR 4 November 2020 cols 24–28, 28 and 40.

34 *Procter v Smiles* (1886) 55 LJ QB 527.

35 *Great Atlantic Insurance v Home Insurance* [1981] 1 WLR 529.

36 See *SL Claimants v Tesco Plc (CMC) Manning and Napier Fund Inc (MLB Claimants) v Tesco Plc (CMC)* [2019] EWHC 3315 (Ch) at [42] per Hilyard J.

37 Gavin Murphy, 'Time to waive LPP on government legal advice in the UK' (2018) 44 *Commonwealth Law Bulletin* 311, 315.

38 Bankim Thanki and Chloe Carpenter, *The Law of Privilege* (Oxford: OUP, 3rd ed, 2018) at [5.05].

the other. In practice, unlike the system that exists in civil proceedings, when parliament demands disclosure of legal advice to government there is no judge to determine whether partial disclosure of legal advice has resulted in a loss of confidentiality and to order disclosure if it has. Consequently, in the parliamentary context, the reality appears to be that partial disclosure to parliament will not oblige government to undertake full disclosure but may satisfy the demands of parliament or, perhaps more likely, will provide additional incentive to those who consider deploying mechanisms such as motions for return or motions of no confidence.

In order to assert LPP in civil proceedings the client, as part of the disclosure process, will disclose a list of documents, indicating in the list those documents in relation to which the party claims privilege.³⁹ The other party may then apply to the court to dispute the existence of privilege in relation to some of these documents.⁴⁰ When required to determine whether a disputed claim of privilege is established the court possesses discretion to inspect the documents, but should exercise its discretion with caution.⁴¹ In Scotland the procedure is different, but where the court upholds an assertion of LPP, this prevents recovery of documents under a motion for commission and diligence.⁴²

In circumstances in which it is parliament rather than a litigant that desires production of allegedly privileged documents by the government there will be no list of documents such as that which parties to civil proceedings are required to make.⁴³ The communications that members of parliament wish to have disclosed will either be communications that they have reason to believe were made or communications that they assume were likely to have been made.

An assertion by members of parliament that communications are not or may not be privileged is hampered by the fact that there is no adjudication process to determine the validity of the privilege claim, with no judge to order disclosure if the claim is unsubstantiated. Because there is no judge to order disclosure when parliament seeks disclosure of Law Officers' advice, the only option available to members of parliament who wish to compel government to disclose such advice is to rely upon mechanisms such as a motion for return or a motion of no confidence to persuade the government to disclose the relevant communications. One consequence of the events that resulted in the Attorney

39 See CPR 31.10. Under the Disclosure Pilot for the Business and Technology Courts, the grounds upon which privilege is claimed must be explained in the Disclosure Certificate (see CPD 51U 14.1).

40 CPR 31.19(5). For the process under the Disclosure Pilot for the Business and Technology Courts see CPD 51U 14.2.

41 See *WH Holding Ltd and another company v E20 Stadium LLP* [2018] EWCA Civ 2652 at [72] per Sir Terence Etherton MR and see CPR 31.19(6)(a) and (re the Disclosure Pilot for the Business and Technology Courts) see CPD 51U 14.3. Under the Disclosure Pilot the court should be even more cautious before inspecting the documents to determine whether they are privileged, because CPD 51U 14.3 imposes a new necessity test in this context (see *UTB LLC v Sheffield United Ltd* [2019] 3 All ER 698; [2019] EWHC 914 (Ch) at [72] per Sir Geoffrey Vos C).

42 For a recent example see *David John Whitehouse and another v The Lord Advocate* [2019] CSOH 38.

43 In legal proceedings in Scotland a party would draft a specification of documents (see for example *ibid*).

General's advice being disclosed in the Withdrawal Agreement context was to demonstrate that LPP and the Convention do not prevent the government being adjudged to be in contempt if it fails to comply with a resolution requiring advice from the Law Officers to be produced.⁴⁴ As Murphy points out, this mechanism is unlikely to be successful unless there is a minority government with the party holding the balance of power siding with the opposition.⁴⁵ There may be more scope for utilising such mechanisms in the Scottish parliament as the proportional electoral system in Scotland makes achieving a single party majority more challenging.⁴⁶

THE CONVENTION AND ITS INTERACTION WITH LEGAL PROFESSIONAL PRIVILEGE

Constitutional conventions and the significance of the Ministerial Code and the Cabinet Manual

Articulations of the Law Officers' Convention appear in the UK, Scottish and Welsh Ministerial Codes and in the Cabinet Manual. The Ministerial Code has been described as an 'authoritative guide' which 'reflects the constitutional, legal, ethical and political expectations that have long existed around ministerial roles' but as having 'no formal constitutional status'.⁴⁷ It is regarded as comprising binding rules (although not legally binding) which Ministers must comply with (or resign),⁴⁸ based on a bottom-up convention of compliance.⁴⁹ Whilst the traditional view is that conventions are informal, it has been suggested that 'the Ministerial Code is an instance of a set of conventions which are in the process of crystallization'.⁵⁰

McHarg regards the Ministerial Code as one of the 'best examples' of conventions being located in a written document in a codified form, but makes the point that 'the binding force' of such conventions 'does not depend upon the fact of their codification, but rather predates it; nor does codification prevent subsequent alteration of the content of the rules if circumstances and practices

44 Mark Hutton and others, *Erskine May: Parliamentary Practice* (LexisNexis Butterworths, 25th ed, 2019) at [7.31] (update 3 July 2022) (*Erskine May*). See, also, Daniel Kenealy and Stuart MacLennan, 'Legal professional privilege of advice of the Attorney General' (2019) 24 *Cov LJ* 81, 82.

45 Murphy, n 37 above, 316.

46 For example see Akash Paun and Sam Macrory, 'Has Devolution Worked? The first 20 years' (Institute for Government, 16 July 2019) 37 at <https://www.instituteforgovernment.org.uk/sites/default/files/publications/has-devolution-worked-essay-collection-FINAL.pdf> [<https://perma.cc/BD4X-2ZHH>] and 'Is the Scottish Parliament designed to return a majority?' *The Herald* 10 May 2021 at <https://www.heraldsotland.com/news/19291640.scottish-parliament-designed-return-majority/> [<https://perma.cc/CS5D-H9KT>].

47 Tim Durrant, Jack Pannell and Catherine Haddon, 'Updating the Ministerial Code' (Institute for Government, 1 July 2021) 5 at <https://www.instituteforgovernment.org.uk/sites/default/files/publications/updates-ministerial-code.pdf> [<https://perma.cc/KE6Y-EXWN>].

48 Adam Perry and Adam Tucker 'Top-Down Constitutional Conventions' (2018) 81 *MLR* 765, 774, 775.

49 *ibid*, 767-770, 776.

50 Nicholas W. Barber, 'Laws and Constitutional Conventions' (2009) 125 *LQR* 294, 309.

change'.⁵¹ The Ministerial Code and the Welsh Ministerial Code (the Welsh Code) both provide articulations of the Convention that are inadequate in that they fail to describe the way in which the Convention operates in practice. In contrast, whilst the Scottish Code does not suffer from this defect, it articulates the Scottish Government's 'variation of the law officers' convention'⁵² which differs in significant respect from the Convention as applied in the other three UK countries.

The Cabinet Manual, on its title page,⁵³ identifies itself as '[a] guide to laws, conventions and rules on the operation of government'. It has been asserted in relation to the Cabinet Manual that codification of conventions by such documents 'is likely to influence change in the nature of individual conventions ... through promoting particular versions of them'.⁵⁴ This must equally be true of the Ministerial Code. The Cabinet Manual's articulation of the Convention suffers from the same defect as the Ministerial Code and the Welsh Code.

The Prime Minister determines the terms of the Ministerial Code,⁵⁵ meaning they can add or delete provisions or change what is already there. Perry and Tucker argue that the Ministerial Code includes both established practice and substantive changes 'designed to shape practice rather than to merely reflect it'⁵⁶ and describe additions made by the Prime Minister to the Ministerial Code which are constitutional in character (for example those relating to the conduct of ministers) as an example of a top-down convention, quoting Madgwick and Woodhouse in describing the Code as 'the defining constitutional document on [the] Prime Minister and Cabinet'.⁵⁷ It could certainly be argued that a convention that is heavily contested in terms of its content and effect does not amount to an effective convention at all,⁵⁸ making codification challenging. Where there are different views regarding the precise nature of a convention, Blick's analysis (provided in the context of consideration of the Cabinet Manual) is that codification can be viewed as giving the Executive's understanding of the terms of a particular convention,⁵⁹ which might then give that interpretation more weight.⁶⁰ This appears to be so as regards the articula-

51 Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 MLR 853, 859.

52 Conor McCormick and Graeme Cowie 'The Law Officers: A Constitutional and Functional Overview' House of Commons Library Briefing Paper, 08919 (28 May 2020) 31.

53 Cabinet Office 'The Cabinet Manual' (1st ed October 2011) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf [<https://perma.cc/T5C8-QXYL>].

54 Andrew Blick, 'The Cabinet Manual and the Codification of Conventions' (2014) *Parliamentary Affairs* 67, 205.

55 Public Administration Committee, *Second Report* HC 235 (2001-02) Appendix; Perry and Tucker, n 48 above, 776. The Scottish and Welsh Ministerial Codes are issued by the respective First Ministers. In Northern Ireland, changes to the Ministerial Code proposed by the Executive Committee must be put before the Assembly for approval, Northern Ireland Act 1998, s 28A.

56 Perry and Tucker, n 48 above, 775.

57 *ibid*, 776.

58 Joint Committee on Conventions 'Conventions of the UK Parliament vol 1, 2005-2006' HL Paper 265-I, HC 1212-I (3 November 2006) at [34].

59 Blick, n 54 above, 191, 203.

60 *ibid*, 191, 199.

tion of the Convention in the Scottish Code. In contrast the articulations in the Ministerial Code and the Cabinet Manual do not explain the UK Government's understanding of how the Convention's exception operates, and the Welsh Code exhibits identical deficiencies.

Due to their informal nature, if there are future discrepancies between practice and the provisions of the Ministerial Code it is likely that these would have to be resolved through parliamentary means, such as a resolution of the House of Commons.⁶¹ As regards the Law Officers' Convention, major advocates for disclosure accept that Law Officers' advice 'should normally remain confidential',⁶² with arguments between those favouring and opposed to disclosure focusing on the applicability of the exception. Consequently, a more detailed articulation of the Convention in the Ministerial Code and the Cabinet Manual, which reflected established practice and provided greater transparency and certainty, might well be uncontroversial.

The Law Officers' Convention

According to *Erskine May*, the Convention is that both 'the fact' that Law Officers' advice has been given and 'the substance' of such advice are not disclosed to parliament.⁶³ *Erskine May* also indicates that whilst non-disclosure is the general rule, Law Officers' opinions may be disclosed where 'a Minister deems it expedient'. This provides very limited guidance regarding the circumstances in which disclosure may take place. *Erskine May* does not articulate the requirement for Law Officers' consent that is referred to in the Ministerial Code. It does recognise that the Convention has two limbs – one preventing disclosure of the substance of Law Officers' advice and the other preventing disclosure of the fact that such advice has been given. For the remainder of this article the former limb will be referred to as the 'content limb' and the latter limb as the 'fact limb'. *Erskine May* articulates the Convention's rationale in equivalent terms to the rule of law rationale that underlies LPP.

The Ministerial Code describes the Convention in a single sentence, as follows: 'The fact that the Law Officers have advised or have not advised and the content of their advice must not be disclosed outside Government without their authority'.⁶⁴ The Ministerial Code does not make clear either that the normal rule is that disclosure will not take place or that the catalyst for exceptional disclosure is a ministerial view that disclosure is expedient. It does not provide any guidance regarding the nature of those circumstances in which the exception to the Convention is applicable other than in articulating the Law Officers' consent requirement.

The Welsh Code adopts an equivalent and equally brief articulation of the Convention, subject to the same deficiencies as the Ministerial Code, as follows:

61 Conor Crummey and Eugenio Velasco Ibarra, 'Statutory conventions: conceptual confusion or sound constitutional development?' [2018] PL 613, 623.

62 See for example HC Deb vol 649 col 191 13 November 2018 (Keir Starmer).

63 *Erskine May* n 44 above at [21.27].

64 Cabinet Office, 'Ministerial Code' (December 2022) at [2.13].

‘The fact that the Counsel General has advised (or has not advised) and the content of advice given by the Counsel General must not be disclosed outside the Welsh Government without the authority of the Counsel General’.⁶⁵

The Cabinet Manual reprises the guidance provided by the Ministerial Code and in so doing exhibits the same flaws that were identified above. Unlike the Ministerial Code, the Welsh Code and *Erskine May*, the Cabinet Manual expressly recognises that LPP attaches to Law Officers’ advice in providing as follows: ‘The fact that the Law Officers have advised, or have not advised, and the content of their advice may not be disclosed outside government without their authority. The Law Officers’ advice to government is subject to legal professional privilege (LPP) and is confidential.’⁶⁶ In the interests of providing additional clarity it would make sense for express recognition of the applicability of LPP to be incorporated in the Ministerial Code and the Welsh Code. The Cabinet Manual’s implicit recognition that the Convention’s content limb is grounded in LPP supports the view that the content limb is best understood as limiting the nature of those circumstances in which LPP in such advice may be waived by government.

This limitation on waiver of LPP imposed by the Convention restricts waiver of LPP in Law Officers’ advice to extremely exceptional circumstances in which disclosure is overwhelmingly in the public interest and Law Officers’ consent to disclosure is obtained. That the existence of the Convention has resulted in disclosure of Law Officers’ advice being highly exceptional is supported by the fact that at the time demands for disclosure of legal advice relating to the Withdrawal Agreement were made, modern examples of the exception being relied on by the UK Government to disclose Law Officers’ advice were extremely rare.⁶⁷

The earliest articulation both of the Convention and of the nature of its exception, which is relied on as a precedent by *Erskine May*, comes from Viscount Palmerston in 1865. This related to circumstances in which the Government wished to rely on the advice of a Law Officer that had been prepared to be read out in Parliament, and a Member of Parliament questioned whether Law Officers’ opinions ‘ought to be read to the House’.⁶⁸ Viscount Palmerston explained the Convention’s rationale in terms of potential Law Officers’ caution in expressing opinions that might be made public, as opposed to the focus on potential client caution that forms the basis of the rule of law rationale for LPP. So far as the exception to the Convention is concerned, Viscount Palmerston recognised that the Government possessed discretion to disclose Law Officers’ advice to Parliament and that ‘there may be occasions ... when it is convenient and proper for the convenience of the House that such opinions should be made known.’⁶⁹ He did not articulate the requirement of Law Officers’ con-

65 Welsh Government, ‘Ministerial Code’ (5 August 2021) at [6.19].

66 Cabinet Office, n 53 above at [6.9].

67 Full advice only in the context of the Iraq war (see HC Deb vol 649 col 205 (David Liddington) and see also *ibid* col 195 (Keir Starmer)).

68 HC Deb vol 177 col 354 17 February 1865 (Mr Whiteside).

69 *ibid.* cols 354–355.

sent. This is not surprising given that the advice had been prepared to be read out in Parliament.

Lord Goldsmith (also relied on as providing a precedent by *Erskine May*) described the Convention's rationale in equivalent terms to the rule of law rationale for LPP, indicating that it 'enables the Government to obtain frank and full legal advice in confidence, as everyone else can'.⁷⁰ He did not regard Viscount Palmerston's formulation of the Convention as addressing 'the circumstances in which the convention ... may be departed from' and indicated that these are 'rare' and that 'an overwhelming public interest in disclosure' is required.⁷¹ This makes clear that the exception as applied in practice is narrower than the formulations expressed by Viscount Palmerston, in *Erskine May*, in the Ministerial Code, in the Welsh Code and in the Cabinet Manual would suggest. Lord Goldsmith did not refer to the requirement of Law Officers' consent that is articulated both in the Ministerial Code and in the Cabinet Manual. More recently, in the context of Law Officers' advice in relation to the Withdrawal Agreement, the Solicitor General (Buckland) made clear that disclosure required Law Officers' consent, that such consent was both sought and given only 'very rarely' and that it would only be given in the context of 'a very powerful countervailing public interest'.⁷²

Viscount Palmerston's expression of the Convention's rationale differs from the rule of law rationale for LPP in focussing on caution on the part of the legal advisers (the Law Officers) in providing an opinion rather than caution on the part of the client (the government) in communicating in candour with the legal adviser. In contrast, Lord Goldsmith recognised that the Convention 'enables the Government to obtain frank and full legal advice in confidence, as everyone else can'.⁷³ Unlike the rationale for the Convention as expressed by Viscount Palmerston, but in line with the explanation provided by *Erskine May*, this does align with the rule of law rationale. The House of Commons Procedure Committee (the Procedure Committee) recognised the importance of the Convention and did not suggest that the House of Commons ought not to respect it. It recognised that 'the convention is necessary to the proper and effective functioning of the Executive' which 'has a right to receive legal advice on the privileged terms which govern the relationship between every lawyer and client'.⁷⁴ This, again, explains the rationale for the Convention in terms that align it to the rule of law rationale.

Deployment of the rule of law rationale in relation to the Convention explains why government, in the same way as a private or corporate client, should be entitled to object to disclosing legal advice that it has received by relying on LPP. What it does not explain is why the ability of ministers to waive LPP should be restricted to exceptional circumstances, whereas no such restriction limits private or corporate clients. This suggests that the Convention's ratio-

70 HL Deb vol 654 col WA279 18 November 2003.

71 *ibid.*

72 HC Deb vol 649 col 234 13 November 2018.

73 HL Deb vol 654 col WA279 18 November 2003.

74 House of Commons Procedure Committee, *The House's power to call for papers: procedure and practice* HC 1904 (2019) at [57], [61].

nale must incorporate additional justifications that go beyond the rule of law rationale.

One additional justification may equate with Viscount Palmerston's explanation of the Convention as being based on the avoidance of Law Officer caution. The Ministerial Code and the Welsh Code both provide that, 'By convention, written opinions of the Law Officers, unlike other ministerial papers, are generally made available to succeeding Administrations'.⁷⁵ It has been suggested that the Convention 'is ... a facet of the important constitutional convention of collective Cabinet responsibility', and that 'Law Officers' contributions to ... Cabinet discussions and decisions should ... be protected, just as the contributions of other Cabinet Ministers or the minutes of Cabinet meetings themselves are protected'.⁷⁶ In defending the initial decision not to disclose Law Officers' advice in the context of the Withdrawal Agreement, the Solicitor General (Buckland) asserted that, 'the quality of collective decision making in government is dealt a fatal blow when, bit by bit, that decision making is subdivided, unpicked and, frankly, made almost impossible even in circumstances as important and exceptional as this'.⁷⁷ Viscount Palmerston's focus on Law Officers' caution appears to provide a justification for restricting government's ability to waive LPP in the context of the special circumstances of the Law Officers who are both politicians and junior ministers, with the Attorney General attending some cabinet meetings.

A second additional justification is that as a general rule there is a strong public interest in not disclosing Law Officers' advice. For example, in the context of the Withdrawal Agreement, Cox (then Attorney General) initially justified his refusal to break the Convention as being grounded solely in the public interest.⁷⁸ Subsequently, when conceding that the relevant advice be disclosed, he made clear that the 'Convention provides the fullest guarantee that the business of Governments is conducted at all times in the light of thorough and candid legal advice, which may also enter into matters of acute sensitivity to the public interest'.⁷⁹ It is the scarce Law Officer resource that will tend to be utilised when matters fall into this acutely sensitive public interest category. For example, the Ministerial Code indicates that '[t]he Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations'.⁸⁰ Similarly, the Welsh Code indicates that it is appropriate for the opinion of the Counsel General to be sought where legal questions are 'of greatest legal complexity, or political controversy or sensitivity, or which have the widest implications'.⁸¹ And the Scottish Code indicates that 'the Law Officers must be consulted in good time before the Government is committed to 'significant decisions involving legal considerations'.⁸²

75 Cabinet Office, n 64 above at [2.11]. Welsh Government, n 65 above at [6.19].

76 HC Deb vol 649 col 205 13 November 2018 (David Liddington).

77 *ibid.* col 232.

78 HC Deb vol 650 col 564 3 December 2018.

79 HCWS1142 (5 December 2018).

80 Cabinet Office, n 64 above at [2.10].

81 *ibid.* at [6.18].

82 Constitution and Cabinet Directorate, 'Scottish Ministerial Code' (February 2018) at [2.32].

A third additional justification for the Convention is the danger that if Law Officers' advice is disclosed regularly (including if parliament succeeds in deploying motions to require government to disclose such advice too regularly) a precedent favouring disclosure will be established. This could result in future governments being reluctant to request such advice. When conceding that the Government would disclose the advice provided in the context of the Withdrawal Agreement, Cox indicated that 'The release of this advice does not set a precedent for any future release of Law Officers' advice'.⁸³ The danger is that, post this disclosure, with *Erskine May* recognising that 'a failure to comply with a resolution calling for the production of the Attorney-General's legal advice to the Government has been judged to be a contempt',⁸⁴ a precedent for Parliament to demand and achieve the disclosure of Law Officers' advice on a more regular basis has in fact been set. The danger of setting such a precedent was recognised by the Deputy First Minister in Scotland who made clear that 'ministers today have a duty to ministers in the future, which is that we do not create precedent that can essentially weaken the ability of Government to exercise its functions'.⁸⁵

Merely equating the Convention's rationale with the rule of law rationale also fails to explain why the Convention has a fact limb. Under the Convention, the fact that advice has or has not been provided by the Law Officers is not normally disclosed. In contrast, in civil proceedings, the fact that a particular person is instructing a particular legal adviser would not normally be an LPP issue.⁸⁶

The existence of the fact limb has been justified on the basis that most legal advice to government is provided by the large Government Legal Service (or by independent counsel instructed to provide such advice). With Law Officers' advice being a scarce resource, requiring disclosure of whether or not Law Officer advice was provided would distort the process via which that scarce resource is allocated. Government might have political reasons for patently instructing Law Officers even though the issues to be resolved do not justify this or might decline to instruct where appropriate to do so if instructing Law Officers might be seen as a sign of weakness.⁸⁷

Unlike *Erskine May*, the Ministerial Code, the Welsh Code and the Cabinet Manual all indicate that disclosure should only take place with the 'authority' of the Law Officers (or in the Welsh context, with that of the Counsel General). Kyriakides,⁸⁸ recognising that the formulation of the Convention in *Erskine May* does not refer to this prerequisite to disclosure, categorises the Law

83 HCWS1142 (5 December 2018).

84 *Erskine May* n 44 above at [7.31] (update 3, July 2022).

85 SP OR 25 November 2020 col 82.

86 It is possible that the identity of a person instructing a lawyer on behalf of a corporate client might be protected by LP if revealing the identity of the former 'would inhibit candid discussion between the lawyer and the client' (*Loreley Financial (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd and others* [2023] 1 WLR 1425 at [38] per Males LJ).

87 *Her Majesty's Treasury v Information Commissioner* n 2 above at [12], from the witness statement of Mr Jones, director and head of the Attorney General's office.

88 K. A. Kyriakides 'The Advisory Functions of the Attorney-General' (2003) 1 *Hertfordshire Law Journal* 73,87.

Officers' consent requirement as an 'adjustment' to the Convention that the 1985–86 'Westland affair' (where a letter containing advice from the Solicitor General was leaked) confirmed had taken place.⁸⁹ Effectively placing final control of the exception's availability in the hands of the Law Officer (the legal adviser) rather than in the hands of the Minister (the client), might in one sense be regarded as aligning with Viscount Palmerston's explanation of the Convention's rationale, with its focus on removing the need for Law Officer caution. It might, conversely, be viewed as contrary to Viscount Palmerston's explanation of the Convention's exception, which he regarded as a discretion possessed by the Government. It is important to recognise, however, that Lord Palmerston would not have found it necessary to consider the issue of Law Officer consent, given that the document in question had been written by a Law Officer at the request of a Minister for the purpose of being read out in Parliament.⁹⁰ In those circumstances, consent was implicit.

The Scottish Code differs from the Ministerial Code, the Welsh Code and the Cabinet Manual in three significant ways. First, it provides additional guidance concerning the nature of the Convention and the operation of its exception. Secondly, it creates a variant of the Convention under which the Convention's fact limb is modified and under which the fetter that the Convention imposes upon waiver of LPP in legal advice to government encompasses legal advice from all legal advisers, not just from Law Officers. Finally, it modifies the Convention to reflect the role of Law Officers in a devolved administration in advising on the legislative competence of Bills.

The relevant provisions of the Scottish Code provide as follows.

- 2.38 Ministers may acknowledge publicly that they have received legal advice on a particular topic, but must not divulge either who provided the advice or its contents (whether it is from the Law Officers or from anyone else). This applies to all forms of legal advice, including advice on a particular subject or advice associated with clearance of a document.
- 2.39 This approach is required in order to take account of the public interest in maintaining:
 - (a) The right to confidentiality of communications between legal advisers and their clients (sometimes referred to as legal professional privilege); (b) The Law Officer Convention that the Scottish Government, like the UK Government, does not, other than in exceptional circumstances, disclose the fact that legal advice has or has not been given to the Government by or sought from the Law Officers, or the content of any such advice.
- 2.40 If, in exceptional circumstances, Ministers feel that the balance of public interest lies in disclosing either the source or the contents of legal advice on a particular matter, the Law Officers must be consulted and their prior consent obtained. Such consent will only be granted where there are compelling reasons for disclosure in the particular circumstances.
- 2.41 The provision in paragraph 2.38 preventing Ministers from divulging whether or not Law Officers provided legal advice does not apply in relation to Bills introduced in the Parliament because it is acknowledged publicly that the

⁸⁹ *ibid.*, 86–87.

⁹⁰ HC Deb vol 177 cols 354–355 17 February 1865.

Law Officers advise on the legislative competence of Government Bills (see paragraph 3.4 below). Views given by the Law Officers in their Ministerial capacity, as opposed to legal advice provided by them in their capacity as legal advisers, are also not covered by the provision in paragraph 2.38.

Like the Ministerial Code, the Welsh Code and the Cabinet Manual, paragraph 2.40 of the Scottish Code provides that Law Officers' consent is required for the exception to the Convention to be activated, but also provides additional guidance as regards the nature of the Convention's exception in two respects. First, it makes clear that the variant Convention creates a two stage process, such that where government, exceptionally, identifies a public interest in disclosure (stage one) disclosure will only take place if the Law Officers' ratify this ministerial public interest decision by providing their consent (stage two). Secondly, it provides that Law Officer consent is contingent upon the existence of 'compelling reasons for disclosure in the particular circumstances'. The Scottish Deputy First Minister, effectively recognising that determining whether the exception to the Convention applies is a fact sensitive decision, suggested that relevant considerations included the public interest (including that in maintaining confidentiality), procedures to preserve confidentiality if the material is disclosed, the likelihood of future litigation and the impact of disclosure on future government operations.⁹¹

The additional guidance provided by the Scottish Code in relation to the operation of the Convention's exception was introduced into it subsequent to receipt of a report from Sir David Bell (the Scottish Government's independent adviser on the Ministerial Code).⁹² Sir David had recommended a redraft 'in a clearer and more accessible form' including 'rules on whether ... existence or content should be disclosed and, if so, in which circumstances'.⁹³ He believed that this would 'help Ministers explain their position to Parliament, the media and the public'.⁹⁴

Adding additional guidance to the other three Ministerial Codes and the Cabinet Manual would have the same benefits. Such guidance could reflect the Convention as applied by the UK Government, as expressed by Lord Goldsmith and Buckland, by making clear that Law Officers' consent would only be given where justified by overwhelming/very powerful public interest considerations. There is nothing in Hansard to suggest, however, that a two-stage process via which ministers must be satisfied that the public interest favours disclosure before consulting the Law Officers forms a prerequisite to disclosure under the Convention. Rather, that two stage process seems to be a feature of the Scottish

91 Letter from Deputy First Minister and Cabinet Secretary for Education and Skills John Swinney MSP to the Committee on the Scottish Government Handling of Harassment Complaints (7 September 2020) at https://archive2021.parliament.scot/HarassmentComplaintsCommittee/SCHHC_Committee_-_late_submissions_pack.pdf. [<https://perma.cc/7F2H-YA4F>].

92 Scottish Government, 'FM Cleared by ministerial code report' (SP News Release, 10 January 2013) at <https://www.webarchive.org.uk/wayback/archive/20160108001250/http://www.gov.scot/News/Releases/2013/01/ministerial-code-report10012013> [<https://perma.cc/WMZ3-L9UV>].

93 *ibid*, see Sir David Bell, 'Scottish Ministerial Code: Complaint by Catherine Stihler MSP 7 January 2013' at [60], hyperlinked as University of Reading Report.

94 *ibid* at [61].

variant, with the position in the other jurisdictions being, simply, that the Law Officers are ‘the stewards’ whose role is ‘to jealously guard the gate’.⁹⁵

The Harassment Committee recommended the development of ‘a protocol between the Scottish Government and the Parliament ... setting out the general circumstances in which the Parliament would expect legal professional privilege to be waived in future’.⁹⁶ In reality it would be impossible to provide guidance that envisaged every potentially relevant circumstance. It might be unrealistic and perhaps unhelpful to attempt to identify in advance specific categories of circumstance that were sufficiently significant to justify disclosure of Law Officers’ advice. The approach of the Solicitor General (Buckland) is to be preferred. He expressed the view, in the context of the Withdrawal Agreement, that disclosure of legal advice from the Law Officers’ should only be considered on ‘a strict case-by-case basis’.⁹⁷

The Scottish Code does not prevent ministers from revealing that Law Officers’ advice was received with regard to Bills before Parliament, because it is public knowledge that such advice is provided.⁹⁸ This reflects the role identified in the Scottish Code of the Law Officers ‘clearing’ the statement which accompanies a Bill that it is within the Parliament’s legislative competence.⁹⁹ The statement is required by section 31 of the Scotland Act 1998. There is similar statutory underpinning in Wales and Northern Ireland.¹⁰⁰ The adoption of a similar provision in the Welsh Code would make sense and if the Convention is eventually articulated in the Northern Irish Code the inclusion of a similar provision would also be sensible.

Another difference between the articulation of the Convention in the Scottish Code and those in the Ministerial Code, the Welsh Code and the Cabinet Manual is that the former expressly acknowledges that the Convention and LPP do not apply to views expressed by Law Officers whilst acting as ministers rather than as legal advisers.¹⁰¹ This provides greater clarity and transparency than the articulations of the Convention in the other Ministerial Codes and the Cabinet Manual, and could beneficially be adopted in them. The point was made in the Scottish Code prior to Sir David Bell’s report, but is made more clearly in the current version of the Scottish Code.¹⁰²

The most significant difference between the articulation of the Convention in the Scottish Code and the versions in the Ministerial Code, Welsh Code and Cabinet Manual, is that under the Scottish Code the Convention applies to all legal advice to ministers, not just to legal advice from Law Officers.¹⁰³

95 HC Deb vol 649 col 234 13 November 2018.

96 Committee on the Scottish Government Handling of Harassment Complaints, n 14 above at [102].

97 HC Deb vol 649 cols 233–234 13 November 2018.

98 Constitution and Cabinet Directorate, n 82 above at [2.41].

99 *ibid* at [3.4].

100 Government of Wales Act 2006, s 97(2); Northern Ireland Act 1998, s 9.

101 Constitution and Cabinet Directorate, n 82 above at [2.41]. That this applies both to the convention and to LPP is implicit as [2.39] makes clear that the articulation of the Convention in [2.38] is intended to encompass both LPP and the Convention.

102 Compare para 2.41 of the 2008 version with para 2.30 of the 2018 version, both of which were reproduced above.

103 Constitution and Cabinet Directorate, n 82 above at [2.38].

In extending the Convention to encompass all legal advisers, the effect of the Scottish Code is to create a variant convention, perhaps better described as a legal advice convention, rather than as a Law Officers' Convention. This variant pre-dates the amendments to the Scottish Code that were made subsequent to Sir David Bell's report. The 2008 version of the Scottish Code had previously provided as follows: 'The fact that legal advice has been given to the Scottish Government (by the Law Officers or anyone else), and the content of any such advice, is not revealed outwith the Scottish Government without the Law Officers' prior consent. Additionally, it should be noted that there is a clear distinction between the views given by the Law Officers in their Ministerial capacity and their formal legal advice sought under the circumstances set out above.'¹⁰⁴

Given that the additional justifications that distinguish the Convention's rationale from that for LPP are not applicable where legal advice is provided by advisers other than Law Officers', there is no imperative or indeed justification for adopting this Scottish variant in the other Ministerial Codes or in the Cabinet Manual. Indeed, as is seen below, restricting the ability of government to waive LPP in legal advice in general, may conflict with the proper administration of justice.

The Scottish Code permits ministers to reveal that they have received legal advice but prohibits them from revealing both the contents of the advice and who provided it (which may or may not have been the Law Officers).¹⁰⁵ The effect is that the Convention's fact limb is replaced in Scotland by a variant which will henceforth be described as the 'identity limb'. The identity limb was adopted in Scotland when Sir David Bell's recommendations were implemented. Part of the background to Sir David's report had been an order by the Scottish Freedom of Information Commissioner that the Scottish Government reveal whether it had taken legal advice on Scotland's status in the EU should it become independent.¹⁰⁶ Given the decision of the Administrative Court in *Her Majesty's Treasury v Information Commissioner*,¹⁰⁷ which recognised the continued significance of the Law Officers' Convention post the enactment of freedom of information legislation, there is no necessity to adopt the identity limb to replace the fact limb in the other Ministerial Codes or the Cabinet Manual. Moreover, replacement of the fact limb with the identity limb would only be appropriate in the context of a variant Convention which (like the Scottish variant) applied to all legal advisers to government, not just to Law Officers.

104 The Scottish Government, 'Scottish Ministerial Code' (June 2008) at [2.30].

105 Constitution and Cabinet Directorate, n 82 above at [2.38].

106 Scottish Information Commissioner, Decision 111/2012, Catherine Stihler MEP and the Scottish Ministers; Case Ref 201101968 (6 July 2012) at <https://www.itspublicknowledge.info/sites/default/files/Decision111-2012.pdf> [<https://perma.cc/22AM-7GHL>]. See also Paul Hutcheon, 'SNP Government changes ethics code without input from MSPs', *The Herald* 14 June 2015 at <https://www.heraldscotland.com/news/13412794.snp-government-changes-ethics-code-without-input-msps/> [<https://perma.cc/9GVK-ZS94>].

107 n 2 above.

Recent pressures impacting on the continued viability of the Convention

Pressures on the continued viability of the Convention may be imposed both by parliament itself and, if disclosure becomes more routine, by the impact of freedom of information mechanisms. The pressure that can be imposed by parliament upon government to disclose Law Officers' advice becomes particularly significant in periods of minority government. In the most recent examples of disclosure, Parliament expressed its will regarding the disclosure of legal advice received by Government through motions, followed by either a finding of contempt or a threat of a no-confidence motion. In both instances there was an acknowledgment of the importance of confidentiality, followed by argument as to why, in the specific instances, the full legal advice should be released.

When former First Minister Salmond appeared before the Harassment Committee, he asserted that the Government had defied the Scottish Parliament in refusing to reveal legal advice that the public had paid for, having lost two votes, and that ministers should follow the expressed will of Parliament.¹⁰⁸ In the UK context, Rees-Mogg argued that 'When the Government lose a vote, they must follow the will of this House under an Humble Address, according to all precedent. It is no longer a matter for the Government to judge; it has been decided by this House which is a higher authority'.¹⁰⁹ The Attorney General, in riposte, referred to previous versions of *Erskine May* in which 'the motion for return is confined to documents of public and official character'.¹¹⁰ *Erskine May* has been updated to reflect the fact that, despite the existence of the Convention, the failure to comply with a resolution calling for production of the Attorney General's advice has been 'judged to be a contempt'.¹¹¹ However, this does not amount to resolving the question of what happens next.¹¹²

What sanctions for contempt could have followed had the Attorney General's advice not been disclosed in full? Kenealy and MacLennan pointed out that it is not clear how the situation would have been resolved if the Government had continued to refuse to release the full advice following being found in contempt.¹¹³ It seems highly unlikely that the result would have been either a fine¹¹⁴ or imprisonment,¹¹⁵ with the most likely consequence presumably being suspension of those named in the motion from the House, perhaps unless and until the advice was disclosed.¹¹⁶ Lord Neuberger observed that, in a country without a written constitution, there is no mechanism whereby government ministers can take the matter to court and argue that the constitution protects the government and therefore the advice need not be revealed, despite the decision of Parliament to the contrary.¹¹⁷

108 SP OR SGHCC 26 February 2021 cols 4, 8.

109 HC Deb vol 650 col 563 3 December 2018.

110 *ibid.*

111 *Erskine May* n 44 above at [7.31].

112 Kenealy and MacLennan, n 44 above, 82.

113 *ibid.*

114 A fine has not been imposed since 1666: *Erskine May* n 44 above at [11.27].

115 This has not taken place since the late 19th Century: *ibid* at [11.23].

116 *ibid* at [11.30]–[11.31].

117 Lord Neuberger and Stephen Mayson, 'Legal Professional Privilege: A Conversation with Lord Neuberger' (UCL Faculty of Laws, 14 November 2018) at <https://www.ucl.ac>.

During a debate regarding the release of the Withdrawal Agreement legal advice, the former Attorney General Dominic Grieve stated that, whilst it was open to the Government to decide to publish legal advice, 'that is a different thing from this House trying to coerce the Government into publishing legal advice'.¹¹⁸ And the Attorney General acknowledged that, in contrast to a process involving a court where a judge can resolve issues regarding disclosure of advice, there is no arbiter 'in the procedures of this House'.¹¹⁹

The House of Commons now appears to regard the use of a motion for return to try to compel disclosure of advice protected by the Convention as an appropriate mechanism to persuade the Law Officers to exercise their discretion to disapply the Convention.¹²⁰ The Procedure Committee considered that the nature of a convention that could be disapplied through the exercise of discretion by the Attorney General meant that it was 'entirely in order for Members to seek the exercise of that discretion, and the release of the Attorney General's advice, through a motion for return'.¹²¹ As the Convention is an Executive convention, the Procedure Committee did not favour the House adopting a resolution recognising limits on its power to request papers covered by the Convention.¹²² Unfortunately, when considering the Convention, the Procedure Committee appears to have misunderstood its nature in describing it as 'a convention [that] may be disapplied at the discretion of the Attorney General'.¹²³ This oversimplified and misleading description of the Convention's nature is in line with the inadequate descriptions of the Convention in the Ministerial Code and the Cabinet Manual. Increased willingness on the part of Parliament to compel disclosure of Law Officers' advice apparently fuelled by a misinformed view that the Convention's exception merely amounts to an unfettered discretion on the part of the Law Officers' clearly has the potential to undermine the Convention. This highlights the desirability of a more detailed articulation of the Convention in the Ministerial Code, the Welsh Code and the Cabinet Manual (and the addition of an equivalent articulation in the Northern Irish Code).

A second pressure on the viability of the Convention is that an increased frequency of disclosure of Law Officers' advice may increase the risk that the freedom of information request disclosure mechanism will be more likely to result in requirements for government to disclose Law Officers' advice. Both information subject to LPP¹²⁴ and advice from the Law Officers or requests for such¹²⁵ are exempt information. The issue in Scotland is whether 'the public interest in disclosing the information is not outweighed by that in maintaining

uk/laws/events/2018/nov/legal-professional-privilege-conversation-lord-neuberger [https://perma.cc/WW2V-DVE5].

118 HC Deb vol 649 col 213 13 November 2018.

119 HC Deb, vol 650 col 564 3 December 2018.

120 House of Commons Procedure Committee, n 74 above at [60].

121 *ibid.*

122 *ibid* at [58]-[59].

123 *ibid* at [60].

124 Freedom of Information (Scotland) Act 2002, s 36(1); Freedom of information Act 2000, s 42.

125 Freedom of Information (Scotland) Act 2002, s 29(1)(c); Freedom of information Act 2000, s 35(1)(c).

the exemption'.¹²⁶ In England it is whether 'the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information'.¹²⁷

Where LPP attaches to a communication¹²⁸ or the Convention applies,¹²⁹ the starting point is that there will inherently be cogent public interest against disclosure. In Scotland, however, the Scottish Information Commissioner acknowledged the applicant's assertion that the decision of the Scottish Government to disclose legal advice in the context of Salmond's claim had 'created ... an environment' in which legal advice to Government may in future be 'more circumspect or less effective' and in which 'disclosure of legal advice which is of much greater public interest' (namely, relating to a second independence referendum) 'is unlikely to create any further difficulty'.¹³⁰ The advice in question included both Law Officers' advice and advice from other government lawyers. The Commissioner's decision requiring disclosure of some of the information requested was based on the provision of the Freedom of Information (Scotland) Act 2002 which concerns 'confidentiality' (ie LPP) with no reference to the provision that relates to the Convention. The Commissioner did not refer to the Law Officers' Convention but regarded the Scottish Code as recognising 'that there are exceptions to the convention of not disclosing legal advice'.¹³¹ The Scottish Government subsequently disclosed advice both from the Law Officers and from other government lawyers.¹³² They did so with reference to the provision of the 2002 Act that relates to confidentiality, to LPP and to the Scottish Code, but with no specific reference to the Law Officers' Convention. Both the Commissioner's decision and the response of the Scottish Government would seem to confirm that the Convention articulated in the Scottish Code and now applied in practice in Scotland is best regarded as a variant of the Law Officers' Convention which has been expanded to encompass legal advice to government regardless of whether the legal adviser is a Law Officer. They might also be taken to support the view that the frequency of disclosure of legal advice by the Scottish Government¹³³ has been such as to render future disclosures less exceptional and perhaps to undermine, via the freedom of information mechanism, the variant form of the Convention in the Scottish

126 Freedom of Information (Scotland) Act 2002, s 2(1)(b).

127 Freedom of information Act 2000, s 2(1)(b).

128 See *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB) at [41] and [47].

129 See *Her Majesty's Treasury v Information Commissioner* n 2 above.

130 Scottish Information Commissioner, Decision Notice 048/2022, 'Legal advice on second independence referendum in 2020' Case Ref 202100457 (26 April 2022) at [42] at <https://www.itspublicknowledge.info/sites/default/files/2022-04/Decision048-2022.pdf> [<https://perma.cc/Y6SB-H7RD>].

131 *ibid* at [37].

132 Constitution and Cabinet Directorate, 'Scottish Information Commissioner decision on independence referendum legal advice: response' (18 March 2023) at <https://www.gov.scot/publications/scottish-information-commissioner-decision-on-independence-referendum-legal-advice-response/#:~:text=The%20Scottish%20Government%20considers%20that,to%20challenge%20the%20Commissioner's%20ruling> [<https://perma.cc/YZT2-SS2L>].

133 Several examples of circumstances in which the Scottish government has chosen to publish legal advice were identified when the Government's handling of the harassment complaints was debated, see Murdo Fraser and John Swinney, SP OR 4 November 2020 cols 23 and 26.

Code. The Commissioner's description of the Convention as articulated in the Scottish Code as 'the convention of not disclosing legal advice', rather than as the Law Officers' Convention, would seem to be apposite.

LPP and the Convention

The nature of the relationship between the Convention and LPP has given rise to language from parliamentarians which at times conflates the two, substitutes one for the other or treats the Convention as an addition to LPP. The approach adopted in the Scottish Code is described in it as reflecting both LPP and the Law Officer Convention.¹³⁴ In maintaining its refusal to disclose legal advice received by it, from both Law Officers and external counsel, following two votes in the Scottish Parliament requiring disclosure, the Scottish Government referred both to LPP and to the Law Officers' Convention.¹³⁵ On one occasion the Deputy First Minister referred only to LPP¹³⁶ and on another to waiving 'legal professional privilege or the Law Officer Convention'.¹³⁷ This mixed terminology is less surprising in the Scottish Government context where the convention being applied is a variant that applies to legal advice to government from Law Officers and from other legal advisers.

Similar variations in terminology may be identified in the UK Parliament, where it is the Law Officers' Convention in its traditional sense that is being relied upon. For example, in the motion for return, both 'the convention on confidentiality and legal professional privilege' were referred to.¹³⁸ During the second debate on the legal position of the Withdrawal Agreement¹³⁹ and the release of full legal advice, the Attorney General consistently referred to the Convention (but not LPP), but when considering the powers of the House to call for papers, the Procedure Committee referred to the Convention and the Government's right to receive advice on privileged terms.¹⁴⁰ As was seen above, the Ministerial Code (like the Welsh Code) makes no reference to LPP whereas the Cabinet Manual¹⁴¹ and the Scottish Code¹⁴² both refer to it.

The evolution of LPP in civil proceedings has taken place in a context where issues concerning the nature and existence of the privilege and its exceptions have been determined by courts resolving technical disclosure applications and via a tapestry of numerous first instance and appellate decisions over several centuries. In contrast, the Convention and its integrated (sometimes implicit/sometimes patent) operation of LPP in the parliamentary context has developed in the absence of an adjudicative mechanism to determine disclosure

134 Constitution and Cabinet Directorate, n 82 above at [2.39 (a)] and [2.39 (b)].

135 See, for example, The Deputy First Minister (John Swinney), SP OR 25 November 2020 col 65.

136 SP OR 4 November 2020 cols 24–27.

137 Letter from Deputy First Minister, n 91 above.

138 HC Deb vol 649, col 192 13 November 2018.

139 HC Deb vol 650 col 546 3 December 2018.

140 House of Commons Procedure Committee, n 74 above at [57].

141 Cabinet Office, n 53 above at [6.9].

142 Constitution and Cabinet Directorate, n 82 above at [2.38].

disputes. Its existence has given rise to issues in the UK Parliament on a highly exceptional and extremely rare basis, resulting in much less detailed guidance and analysis and a lower level of terminological consistency or precision.

LPP is claimed in civil proceedings via a disclosure process and assertions that privilege does not attach to the relevant communications are determined by judicial adjudication. In contrast, in the parliamentary context, it must be for the Law Officers' to determine not only whether the exception to the Convention applies but also whether the Convention is applicable in the first place. For example, the Scottish Code expressly indicates that '[v]iews given by the Law Officers in their Ministerial capacity, as opposed to legal advice provided by them in their capacity as legal advisers, are ... not covered by the provision in paragraph 2.38'.¹⁴³ It is paragraph 2.38 that prohibits ministers from disclosing both the source of legal advice and the contents thereof, though paragraph 2.38 does not prevent ministers from revealing that they have received legal advice. In the absence of an adjudicative process, it is presumably for the Scottish Law Officers' themselves to determine whether communications by them amount to legal advice or to views given as ministers, meaning that the Convention does not apply. The Ministerial Code (like the Welsh Code), which merely refers to 'advice',¹⁴⁴ does not make clear whether the operation of the Convention is limited such that, like LPP, it only applies to legal advice. *Erskine May* refers to 'advice', to 'legal advice' and to 'opinions'.¹⁴⁵ The Cabinet Manual similarly refers merely to 'advice', though indicates that advice to government by the Law Officers is subject to LPP, which suggests that 'advice' is intended to mean legal advice.¹⁴⁶ The approach adopted in the Scottish Code, of referring to legal advice from Law Officers' is to be preferred.¹⁴⁷

In addition, as was recognised above, the distinction articulated in the Scottish Code between legal advice and views given as ministers that do not amount to legal advice provides a level of clarity and transparency that is not found in the Ministerial Code, the Welsh Code or the Cabinet Manual. If this distinction was articulated in the Ministerial Code, the Welsh Code and the Cabinet Manual, this would make clear that LPP does not attach to such views and that there is no scope for the operation of the Convention in relation to them. Bowers and Cornaglia suggested that it was arguable that advice relating to the Withdrawal Agreement was not privileged, because the context was political, rather than legal.¹⁴⁸ If the Attorney General had agreed that this was so, the Government would not have been entitled to rely upon LPP in relation to such advice, and the Convention would not have applied to it. Given the current jurisprudence on LPP, the question should be whether the dominant purpose for which Law

143 *ibid* at [2.41].

144 Cabinet Office, n 53 above at [2.13].

145 *Erskine May* n 44 above at [21.27].

146 Cabinet Office, n 53 above at [6.9].

147 Constitution and Cabinet Directorate, n 82 above at [2.39(b)].

148 R. Bowers and M. Cornaglia, 'Advice from the Attorney General does not attract privilege' *Law Society Gazette* 7 December 2018 at <https://www.lawgazette.co.uk/commentary-and-opinion/advice-from-the-attorney-general-does-not-attract-privilege/5068625.article> [<https://perma.cc/H4QR-PVMQ>].

Officer communications took place was that of giving legal advice.¹⁴⁹ There is no judge to determine technical issues regarding the distinction between non-legal and legal advice in such circumstances, with the government (ie the Law Officers) being its own arbiter. In appropriate circumstances, arguments that Law Officers' advice on a particular topic might not be legal advice, thus not privileged and not covered by the Convention, could be deployed by parliament in justifying setting measures in motion to attempt to compel disclosure on the part of the government without establishing a precedent that could jeopardise the future operation of the Convention.

In an ideal world government would not seek to rely on the Convention in circumstances in which LPP did not attach to Law Officers' advice or in which, having attached initially, it had subsequently been lost. For example, it is arguable that LPP in legal advice concerning the Withdrawal Agreement was lost when the Government released its position paper. If the Attorney General had believed that the detail or extent of the references in the position paper was such as to amount to a loss of confidentiality in the underlying legal advice then neither the Convention nor LPP should have been relied upon.

Ideally, the Ministerial Code, the Welsh Code, the Scottish Code and the Cabinet Manual should all indicate that if the Law Officers do not regard LPP as applying to advice that they have given then the Convention does not apply and government should not seek to rely on it. This would prevent government from relying upon LPP in circumstances in which a private or corporate client could not do so in civil proceedings, would make clear that the Convention was not applicable in such circumstances and would align with the shared rule of law rationale that exists between LPP and the Convention.

Advice to government from legal advisers other than Law Officers

As articulated in Hansard in 1865,¹⁵⁰ in *Erskine May*,¹⁵¹ by Lord Goldsmith,¹⁵² in the Ministerial Code¹⁵³ and in the Cabinet Manual,¹⁵⁴ the Convention (other than in its variant Scottish Code sense) appears to apply only to opinions of or advice from Law Officers. In contrast, LPP is not restricted to legal advice from Law Officers but applies to legal advice from legal advisers in general, which includes solicitors, barristers, legal executives and foreign lawyers.¹⁵⁵

It is clear that a range of actors other than the Law Officers are involved in the provision of legal advice to government. The Attorney General has recognised that 'Ministers are advised by their own departmental lawyers, and the points that arise for consideration of the Law Officers are invariably limited to the

149 *Civil Aviation Authority v Jet2.Com Limited* n 22 above at [86], [94].

150 HC Deb vol 177 cols 354–355 17 February 1865.

151 *Erskine May* n 44 above at [21.27].

152 HL Deb vol 654 col WA279 18 November 2003.

153 Cabinet Office, n 53 above at [2.13].

154 *ibid* at [6.9].

155 *R (Prudential plc and another) v Special Commissioner of Income Tax* [2013] 2 AC 185 per Lord Neuberger of Abbotsbury PSC at [29].

relatively few of particular importance to the policy decision of the Government'.¹⁵⁶ Hand points out in relation to the Attorney General that in addition to a number of lawyers in the Attorney General's Office, additional specialist resource may be provided by the Government Legal Department, by Treasury Counsel, by external counsel on the Attorney General's panel and other counsel whose usage is signed off by the Attorney General.¹⁵⁷

Whilst both contain articulations of the Convention, the Ministerial Code and the Welsh Code are otherwise silent on the issue of privilege in legal advice to government. The Cabinet Manual, recognising that all legal advice to government is subject to LPP, indicates that it is normally for the client government department to determine whether to claim or waive privilege (consulting, as relevant, its legal advisers, the Treasury Solicitor's department or other government departments and referring 'particularly sensitive cases' to the Attorney General).¹⁵⁸ It also indicates that the government will normally waive LPP in civil proceedings if claiming it might result in the court or the opposing party being misled and, in particular, if withholding information 'of central importance to the case ... would prevent the Court from reaching a conclusion that is fair and in the overall public interest'.¹⁵⁹

Starmer sought to rely upon the existence of this practice in seeking disclosure of Law Officers' advice in the context of the Withdrawal Agreement¹⁶⁰ when arguing that 'there is an overriding public interest test in relation to advice provided by the Law Officers that does not apply in the same way to lawyers in private litigation'.¹⁶¹ The Solicitor General (Buckland) whilst recognising the existence of this practice indicated that, 'there is a particular premium on the care that Government Departments take about the disclosure of Law Officers' advice'.¹⁶² This would seem to confirm that in the context of Law Officers' advice the provision of the Cabinet Manual that deals with waiver of LPP is intended to give way to the provision that articulates the Convention,¹⁶³ and that it is the exception to the Convention that will govern the waiver decision in such circumstances. The Scottish Code expressly recognises that the Law Officers 'cannot ... advise on every legal issue which may arise'.¹⁶⁴ It indicates that the Scottish Government Legal Directorate is the Government's main source of legal advice, but that the Government also receives advice from the Law Officers and external legal advisers.¹⁶⁵ The Scottish Code justifies the variant convention that it articulates as being 'required in order to take account of the public interest in maintaining both LPP and the Convention'.¹⁶⁶ Maintaining LPP (unlike maintaining the Convention) neither requires a fetter upon the

156 HC Deb vol 650 col 546 3 December 2018 (Attorney General).

157 James Hand, 'The Attorney-General, politics and logistics – a fork in the road?' (2022) 42 LS 425, 433.

158 Cabinet Office, n 53 above at [6.21].

159 *ibid* at [6.20].

160 HC Deb vol 649 col 197 13 November 2018.

161 HC Deb vol 649 col 198 13 November 2018.

162 HC Deb vol 649 col 234 13 November 2018.

163 Cabinet Office, n 53 above at [6.29].

164 Constitution and Cabinet Directorate, n 82 above at [2.31].

165 *ibid* at [2.31], [2.32].

166 *ibid* at [2.39].

ability of the client to waive LPP nor does it require non-disclosure of the fact that the client has a legal adviser who is providing legal advice in relation to an issue. In relation to legal advice other than from Law Officers, the position articulated in the Cabinet Manual, with an initial presumption in favour of disclosure where the court or parties to civil proceedings might otherwise be misled, is to be preferred in aligning more closely with the public interest in the proper administration of justice.

ARE LPP AND THE CONVENTION JUSTIFIED AS BETWEEN GOVERNMENT AND PARLIAMENT?

Should the government be able to assert a claim of LPP, buttressed by the Convention, against demands from parliament for release of legal advice? Writing in the *Independent*, Higgins argued that the rule of law rationale is highly unlikely to have any bearing on whether or not a government would seek legal advice on an issue as important and as legally complex as the Withdrawal Agreement.¹⁶⁷ If government would be likely to seek legal advice in relation to important issues even if it knew that the advice would not be privileged, should LPP be available as between government and parliament?

In reality, even though the behavioural assumption that underlies the rule of law rationale may not always be valid, LPP is now entrenched in English Law with a status that exceeds that of an ordinary rule of evidence.¹⁶⁸ In *Three Rivers (No 6)*, Lord Scott acknowledged that clients may choose to disclose all relevant information to their lawyer regardless of whether or not privilege is available.¹⁶⁹ Despite this, he regarded the privilege as being justified in 'a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers ... should be secure against the possibility of any scrutiny from others'.¹⁷⁰ Thus, the 'rule of law rationale' may be relied on to justify the existence of the privilege even though it may be the case that the client, whether private, corporate or government, would seek legal advice in any event.

The validity of the rule of law rationale has been reconfirmed by government on a variety of occasions. In the Scottish Parliament the Deputy First Minister recognised that LPP 'is inherent to the functioning of good government and the rule of law'.¹⁷¹ In 2004, during debates in the House of Commons on publication of legal advice relating to the legality of the war in Iraq, Jack Straw (then Secretary of State for Foreign and Commonwealth Affairs) posed the

167 Andrew Higgins, 'Professional privilege is a human right, not a state right – the government must release its Brexit legal advice' *The Independent* 3 December 2018 at <https://www.independent.co.uk/voices/government-legal-advice-withdrawal-agreement-brexite-attorney-general-geoffrey-cox-a8664871.html> [<https://perma.cc/RZ5T-CYPJ>].

168 See *R v Derby Magistrates' Court, Ex parte B* [1996] AC 487 at [507] per Lord Taylor of Gosforth CJ.

169 *Three Rivers (No 6)* n 21 above at [34].

170 *ibid.*

171 SP OR 4 November 2020 col 25.

question whether the same principles that apply to private individuals and corporations should apply to government and concluded that governments' and ministers' need for legal advice is the same as that of private individuals and corporations.¹⁷² In November 2018 the Prime Minister indicated that legal advice received by government is privileged on the same basis as that received by members of the public.¹⁷³ And in the Scottish Parliament the Deputy First Minister explained that '[i]t is important that the legal advice that ministers and their officials receive is full and frank and not affected by concerns about it subsequently becoming public.'¹⁷⁴

If it is accepted that the existence of LPP is entrenched in English Law and that its rationale is equally applicable in the governmental context as it would be, for example, to a large corporation, the question then becomes whether the nature of the government and its relationship with parliament should result in a modification of the privilege as it operates in that context. If LPP is not justified in this context, then the existence of the Convention is undermined.

Murphy argues that the nature of government does not fit neatly into the lawyer client relationship and that, as government 'represents all citizens ... it seems unreasonable to conceal legal advice from the public that the government has obtained (and paid for at taxpayers' expense) on matters potentially affecting them'.¹⁷⁵ He suggests that an exclusion to LPP could apply to government legal advice.¹⁷⁶ If this argument was accepted, a distinction could be drawn between the assertion of LPP by the government against parliament and its assertion by the government against parties to civil proceedings. The argument that legal advice should be revealed to the public because it may potentially affect them would seem much less apposite in the latter context and denying privilege would leave the government at a significant disadvantage to the other side in legal proceedings, a point recognised by Lord Bingham.¹⁷⁷ That being said, as was recognised above, the Government will normally waive LPP in civil proceedings if claiming it might result in the court or the opposing party being misled.¹⁷⁸

Unlike Murphy, parliamentarians who have pressed for the disclosure of full legal advice in specific contexts have recognised the need for government to receive confidential legal advice and have accepted that disclosure should be limited to exceptional circumstances. In the context of the motion for return, the need for the Convention was not disputed by Starmer, the issue being that the specific circumstances were regarded as being exceptional.¹⁷⁹ The Procedure Committee accepted that the Convention is necessary and important, but

172 HC Deb vol 418 cols 1408–1409 9 March 2004.

173 HC Deb vol 650 col 242 28 November 2018.

174 SP OR 4 November 2020 col 25.

175 Murphy, n 37 above, 316.

176 *ibid*, 316, 317.

177 Lord Bingham of Cornhill 'The Rule of Law' The sixth Sir David Williams Lecture, 32, 33 at <https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures/rt-hon-lord-bingham-cornhill-kg-rule-law> [<https://perma.cc/BPZ7-TN2W>]. It is not necessarily the case that a claim for public interest immunity would fill this void, given the circumscriptions on its use.

178 Cabinet Office, n 53 above at [6.20].

179 HC Deb vol 649 cols 191, 193 13 November 2018.

believed that it was not inappropriate for Parliament to seek to catalyse the operation of the exception via a motion for return.¹⁸⁰ In the Scottish Parliament, the Scottish Conservatives accepted that the Convention 'exists for good reasons' but believed that the circumstances were such that 'an overwhelming public interest' required that the Convention be overridden (ie that the exception should be applied).¹⁸¹ So, the issue does not appear to be whether the Convention should exist. Rather, the issues are, first, the nature of those circumstances in which the Law Officers should apply the exception and, secondly, the nature of those circumstances in which it is appropriate for parliament to demand that they do so.

The former issue has already been considered. As regards the latter issue, in his evidence to the Harassment Committee, Salmond referred to the option of putting provisions in the Ministerial Code or standing orders of Parliament to compel disclosure (although also stating that this should not be required where the will of parliament had been made plain).¹⁸² All four Ministerial Codes could make provision for the Law Officers to be required to initiate consideration of the applicability of the Convention's exception not only when a minister requests consent to disclose Law Officers' advice but also when such consideration is catalysed by specific parliamentary processes, such as, for example, by a motion in parliament for disclosure of Law Officers' advice being carried. This would not guarantee disclosure (because even if the exception was applicable, the government or the relevant minister, as 'client', could still decline to waive privilege), but, combined with enhanced guidance as to the operation of the exception, should at least guarantee that a process which was understood by all relevant stakeholders would be carried out. The fact that such a motion has been successful should catalyse Law Officers' consideration of the applicability of the Convention's exception. It should not be determinative of the final disclosure decision because when the majority required to support a motion for return or a no confidence vote is achieved, parliament will have determined this question in the absence of knowledge of the precise nature of the advice and potentially of how damaging to the public interest its disclosure might be.

It would also be useful for the various Ministerial Codes and the Cabinet Manual to explain why the Convention exists. This guidance should be framed to make members of parliament aware, when considering bringing a motion to require disclosure of Law Officers' advice, of the potential consequences for long-term decision making by government if the Convention is eroded.

CONCLUSION

This article has provided new insights into the nature of the Law Officers' Convention and its relationship with LPP via its conclusion that the Convention (and in particular its content limb) are grounded in LPP. The effect of the

180 House of Commons Procedure Committee, n 74 above at [57], [60]-[61].

181 Murdo Fraser, SP OR 4 November 2020 col 23.

182 Committee on the Scottish Government Handling of Harassment Complaints, n 14 above at [12].

Law Officers' Convention as it operates other than under the Scottish Code is to impose a fetter upon the discretion of ministers (the client) both to waive LPP in the content of Law Officers' advice (and thus disclose the advice itself) and to disclose the existence or non-existence of Law Officers' advice. Under the Convention, disclosure should only take place in very exceptional circumstances, where ministers identify that there are overwhelmingly strong public interest considerations in favour of disclosure and obtain Law Officers' consent.

Whilst the rule of law rationale that justifies the existence of LPP also underpins the Convention's content limb, this limb is justified by the following additional considerations which would come into play if disclosure became less exceptional. The risk of Law Officer caution. The fact that Law Officers' advice routinely deals with matters of significant public interest. And the potential for detrimental impact on the quality of governmental decision making if future governments became cautious about obtaining Law Officer advice. The Convention's fact limb has been explained on the basis that disclosing the existence of Law Officers' advice would distort the process by which such advice is allocated.

The manifestations of the Convention in the Ministerial Code, the Welsh Code and the Cabinet Manual do not reflect the Convention as applied in practice. In particular, they fail to articulate that Law Officer consent to disclosure will only be given in highly exceptional circumstances. In contrast, modifications to the Scottish Code, subsequent to implementation of the recommendations of Sir David Bell, were intended to make its description of the Convention clearer to all relevant stakeholders. Enhanced clarity in the Ministerial Code, the Welsh Code and the Cabinet Manual in articulating the Convention would assist government and parliament in understanding both when Law Officers' advice could be disclosed and when it should not and the process to be followed to arrive at a disclosure decision. It would encourage confidence in government to take relevant and appropriate legal advice from its Law Officers in the knowledge that disclosure would be highly exceptional and would encourage parliament to exercise appropriate restraint before attempting to compel disclosure.

The major defect of the articulations of the Convention in the Ministerial Code, the Welsh Code and the Cabinet Manual is that they do not indicate that Law Officers' consent to disclosure will only be forthcoming where justified by overwhelming/very powerful public interest considerations. In addition they do not make clear that the Convention applies to 'legal' advice from Law Officers or that the Convention and LPP do not apply to views expressed by Law Officers acting as ministers rather than as legal advisers. Moreover, unlike the Cabinet Manual, the Ministerial Code and the Welsh Code do not indicate that LPP attaches to legal advice given by Law Officers. The Scottish Code in its current form does not suffer from these defects and in these respects is an exemplar of good practice that could be adopted elsewhere.

None of the Ministerial Code, Scottish Code, Welsh Code and the Cabinet Manual explain why the Convention exists, thus failing to make its rationale clear to stakeholders who might, in ignorance of this, be tempted to undermine it. None of them make clear that the Convention should not be relied on by

government in circumstances in which LPP is not applicable to a communication. None of them provide guidance as to the process to be followed when the catalyst for the Law Officers to consider whether public interest considerations justify disclosure of their advice is not a ministerial request but is a parliamentary process, such as a motion for return. Amendments which dealt with these issues would enhance the clarity and value of the Ministerial Codes and the Cabinet Manual.

Unlike the Scottish Code, which again exhibits good practice in the context of the issue of 'legislative competence', the Welsh Code does not indicate that ministers may reveal that Law Officers' advice was received with regard to Bills before parliament. Extending this good practice to them would enhance both the Welsh and the Northern Irish Codes. More generally, whilst it might be expected to contain an articulation of the Convention equivalent to that in the Welsh Code (ideally amended to address the various defects identified immediately above), the Northern Irish Code does not contain an articulation of the Convention at all.

Finally, whilst it exhibits good practice in several respects, the version of the Convention that the Scottish Code creates is a variant. It encompasses all legal advice to government, not just from Law Officers, thereby extending the Convention's restrictions to encompass legal advice in circumstances in which the additional justifications for the Convention's existence are not applicable. In encompassing advice from all legal advisers, it departs from the more generous (to the other parties) approach in the Cabinet Manual to waiver of privilege in civil proceedings, which is to be preferred in focusing on upholding the public interest in the proper administration of justice. It adopts a two-stage approach to approval of disclosure, involving an initial balancing process by ministers, which is not an element of the Convention as traditionally understood. And it replaces the fact limb with its identity limb, which is only appropriate in the context of a Convention variant that encompasses all legal advisers, not just Law Officers.